No. 305.

Brf. of Hughes & Cullen for D. & E.

... IN THE ...

SUPREME COURT

Filed Sept. 21, 1898.

OF THE

UNITED STATES.

OCTOBER TERM, 1898.

CHARLES MAYGER, and the ST. LOUIS MINING AND MILLING CO., OF MONTANA,

Plaintiffs in Error.

Versus

THE MONTANA MINING COMPANY, LIMITED.

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

Motion to Dismiss for Want of Jurisdiction, and Brief of Defendant in Error.

CHARLES J. HUGHES, Jr.,
and W. E. CULLEN,
Attorneys for Defendant in Error.

... IN THE ...

Supreme Court of the United States.

OCTOBER TERM, 1898.

CHARLES MAYGER and the ST. LOUIS MINING AND MILLING CO., of MONTANA
Plaintiffs in Error.

Vs

THE MONTANA MINING COMPANY, LIMITED,
Defendant in Error.

MOTION TO DISMISS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

Now comes the defendant in error, the Montana Mining Company, Limited, by its Counsel, and respectfully moves dismissal of the writ of error in above entitled cause, for want of jurisdiction in this honorable count.

1. Because no federal question is presented by the record, and
2. Beause the writ of error is taken for delay only.

And the defendant in error further moves the Court to affirm the judgment of the Supreme Court of Montana, although the record may show that this Court has jurisdiction, for the reason that the question on which the jurisdiction depends is so frivolous as not to need further argument.

CHARLES J. HUGHES, JR.
and W. E. CULLEN,
Attorneys for Defendant in Error, the Montana Mining Company, Limited.

... IN THE ...

Supreme Court of the United States,

OCTOBER TERM, 1898.

CHARLES MAYGER and the ST. LOUIS MINING AND MILLING CO. of MONTANA,
Plaintiffs in Error.

Vs.

THE MONTANA MINING COMPANY, LIMITED.
Defendant in Error.

NOTICE OF MOTION.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MONTANA.

To Messrs. Toole, Bach & Toole, Attorneys for Plaintiffs in Error:

Please take notice that on Monday, the tenth day of October, 1898, at the court room of the Supreme Court of the United States, in the City of Washington, at the opening of said Court at 12 o'clock of said day, or as soon thereafter as counsel can be heard, the Defendant in Error, The Montana Mining Company, Limited, will move said Court to dismiss the writ of error herein to the Supreme Court of the State of Montana upon the ground that said Court has no jurisdiction to hear said writ, and that no writ of error lies from the judgment or decree of said Supreme Court of the State of Montana.

Said motion will be heard on the printed transcript of said case, No. 305, on file in the Clerk's office of the said Supreme Court of the United States, and the attached brief.

CHARLES J. HUGHES, JR.
and W. E. CULLEN,
Attorneys for Defendant in Error, The Montana Mining Company, Limited.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

Charles Mayger, and the St. Louis Mining and Milling Company, of Montana,

Plaintiffs in Error.

Versus

The Montana Mining Company, Limited,

Defendant in Error.

BRIEF ON MOTION TO DISMISS.

This cause comes up on a motion made by the defendant in error to dismiss the writ of error sued out in this case for want of jurisdiction, and, united with it, is a motion to affirm the judgment of the Supreme Court of Montana, from which the case comes, on the ground that it is manifest that the writ of error was sued out for delay only, and that the question upon which jurisdiction depends (if this court has any jurisdiction) is so frivolous as not to need further argument. Uniting these motions in this way is authorized by the 5th subdivision of Rule 6 of the rules of this court.

The merits of this motion will be readily understood by a brief synopsis of the pleadings and a terse statement of the case, as developed on the trial in the court below, and shown in the transcript of the record of this court.

PLEADINGS.

The complaint in this case, after alleging the corporate existence of the plaintiff and the defendant company, alleges (Rec., p. 2)

that on the 7th day of March, A. D. 1884, the defendant in error's predecessors in interest, to-wit: William Robinson, John Higgins, Frank P. Sterling, Warren DeCamp and John W. Eddy, were the owners of, in possession and lawfully entitled to the use, occupation and possession of a certain portion of the Nine Hour Lode Mining Claim, embracing in all an area of 12,844.5 feet, together with all the minerals therein contained. That theretofore, on causing to be surveyed for patent his St. Louis Lode Mining Claim, the plaintiff in error, Charles Mayger, wrongfully extended and caused to be extended the easterly boundary line of the said mining claim over the premises above mentioned and particularly described in the complaint, and thereupon the said Mayger wrongfully made application in the United States Land Office at Helena, Montana, to enter said premises as a part of the St. Louis Lode Mining Claim; that thereupon the said predecessors in interest of defendant in error commenced an action in the District Court of the Third Judicial District of the Territory of Montana, to determine the right to the possession of the said premises, in which action the said Robinson and Huggins were plaintiffs and the said Mayger was defendant, that thereupon, and on the 7th day of March, A. D. 1884, to settle and compromise the said suit, and for the purpose of settling and agreeing upon the boundary lines between the Nine Hour Lode and the St. Louis Lode Mining Claim, the defendant, Chas. Mayger made, executed and delivered to the said Robinson, Huggins and Sterling, a certain bond for a deed, whereby, in consideration of the compromise and settlement of said lawsuit and the withdrawal of said protest and adverse claim, he thereby covenanted and agreed that when he should obtain such patent and on demand he would make, execute and deliver to the said Robinson, Huggins and Sterling, or their assigns, a good and sufficient deed for all of the premises in said complaint mentioned; that thereupon Robinson, Huggins and Sterling dismissed their suit, withdrew their adverse claim and performed all of the conditions on their part; that Mayger thereupon proceeded with his application and obtained a patent, but that he gave no notice of it to the plaintiff or any of its predecessors in interest, until on or about the ..... day of November, 1889; that upon the execution of said bond for a deed plaintiff's predecessors in interest were in possession of the said premises, and that they have ever since been and are yet in possession thereof, holding and using the same as a part of the Nine Hour lode; that by mesne conveyance the title to said Nine Hour Lode including the portion thereof above particularly mentioned and described, has come to the plaintiff, and it is now the owner thereof; that it is entitled to a conveyance of the said premises from the said defendant; that the

said Mayger, on or about the 10th of June, 1893, assumed to convey the said piece of ground to the defendant the St. Louis Mining & Milling Company, but that it had full knowledge and notice of the making, execution and delivery of the said bond for a deed by its co-defendant, and of the rights and equities of the defendant in error thereunder; that the St. Louis Mining & Milling Company has instituted a number of suits in the Circuit Court or the United States, in which it claims that it is the owner of the premises described in the complaint, and claiming the right to recover certain sums of money for ores alleged to have been wrongfully mined from said premises. The bond for a deed is appended to the complaint as an Exhibit and marked Exhibit "A." It is in the usual form and covenants that Mayger will proceed to procure as soon as possible a government patent and thereafter upon demand of the said William Robinson, James Huggins and Frank P. Sterling, or their heirs or assigns he agrees to make to the said William Robinson, his heirs or assigns, a good and sufficient deed for the premises mentioned in the complaint.

The answer (Rec., p. 7.) denies that the parties named were the predecessors in interest of the defendant in error, or that they were the owners or possessors of the tract of land in said complaint described, or that they were in possession or entitled to the possession of the same, and they aver that the same is and was a part of the St. Louis Lode Mining Claim, included in the United States patent obtained by the said Mayger for the said claim. They deny that the defendant wrongfully extended or caused to be extended the easterly boundary line of the said St. Louis Mining Claim over the said premises described; but aver that the same was a part of the St. Louis Lode Claim, and that the said Mayger and his successors in interest have been and are now in possession of the same, except a small portion occupied by an ore house of the plaintiff's by sufferance of the defendants. They admit that Mayger made application in the United States Land Office to enter the premises and that the said Robinson and Huggins interposed an adverse claim and instituted an action, and that the agreement set up was entered into between the parties, but deny that it was for the purpose of settling the boundary line between the Nine Hour Lode and the St. Louis Lode, but say it was simply a compromise on account of their adverse claim and suit. They admit that Mayger agreed after obtaining patent, on demand, to make to the said Robinson, Huggins and Sterling, their heirs and assigns, a good and sufficient deed for the premises, but they aver that the plaintiff never has acquired or succeeded to the right, title or interest of the said Robinson, Huggins and Sterling to the said premises. Admits that Mayger

obtained patent, and avers that the plaintiff's predecessor in interest had full knowledge and notice of the issue of the patent. They deny that at the time of the execution of the bond, or at any other time, the plaintiff or its predecessors in interest were or ever have been in possession of said premises, or that they ever used or enjoyed the same, or any part thereof, except the small part aforesaid, or that they ever had, held or enjoyed any part thereof as a part of the said Nine Hour Lode Mining Claim. They admit that plaintiff by mesne conveyance acquired the title to the said Nine Hour Lode Mining Claim, but deny that the said conveyance, or any conveyance of the plaintiff's embraced or included the premises in said complaint mentioned and described, or any part or portion thereof. They admit the demand that was made for a deed, but deny that no demand therefor had ever theretofore been made. Deny that they had any knowledge or notice that defendant in error, was the successor in interest of the said Robinson, Huggins and Sterling at the time of making said deed of the said defendant Mayger, to his said co-defendant. And the defendants affirmatively allege that the adverse claim aforesaid was interposed for the purpose of harrassing said Mayger, and hindering him from obtaining a patent of the St. Louis Lode Mining Claim, and that the said bond was executed as a compromise to avoid the same, all of which was done contrary to equity and good conscience; that on the 22nd day of June, 1887, the said Mayger obtained a United States patent for the premises described in the complaint, as a part and portion of the said St. Louis Lode Mining Claim; that the said St. Louis Mining and Milling Company, learning that the conveyance to it did not comprise the premises described in plaintiff's complaint, for the purpose of better securing its possessory title by it had and held, obtained and received the deed from Mayger mentioned in the complaint. It is then alleged that the cause of action set forth in the plaintiff's complaint is barred by the provisions of Sections 20, 30, 31 and 32, of the Code of Civil Procedure, as found in the Compiled Statutes of the State of Montana.

The replication (Rec., p. 10) specifically denies all new matter presented in the answer.

FACTS.

The facts, as shown by the testimony ,may be briefly stated as follows:

The Nine Hour Lode Mining Claim was located on or about the 26th day of July, 1880, by William Robinson, who was then a competent locator, and he made a good and sufficient discovery and location of the claim, neither of which was questioned at the trial, nor was any question raised as to the sufficiency of the recorded

location notices. At the time this location was made the St. Louis Lode Mining Claim had already been located. It lay to the west of the Nine Hour and Mr. Robinson was careful to set his stakes so as not to conflict with the St. Louis, and so as to leave a strip of vacant ground between his claim and the St. Louis. (Record, p. 13.) Both Charles and William Mayger were on the Nine Hour Claim after its location, and did not make any claim that it conflicted with the St. Louis. (Record, p. 14.) nor was any such conflict known to exist until the St. Louis Lode was surveyed for patent, at which time the easterly side line was run at an angle to the true line, from their northeast corner to their southeast corner stakes, so that a corner known as corner No. 2 was placed within the boundaries of the Nine Hour Lode Claim and so that the easterly side line instead of being a straight line, as it was originally staked, was an obtuse angle between said corner stakes. (Record, p. 17.)

Upon Mayger's filing his application for an United States patent in the Land Office, Robinson and Huggins filed an adverse claim, which was settled by the execution of the bond mentioned in the complaint, copy whereof is attached thereto as "Exhibit A." From the date of making the bond up to the 10th day of June, 1893, the testimony shows that Robinson and Huggins and their successors in interest had the unquestioned possession of the premises. (Record, p. 15.) At the time of making the bond the greater part of their blacksmith shop was upon the "thirty-foot strip," as the property described in the complaint was designated. The dump from the discovery shaft was also on the strip and Robinson sunk prospect holes on the strip afterwards, had a road on it and generally used it as he used any other part of the Nine Hour Claim. The top of the discovery shaft of the Nine Hour Claim was within about ten feet of the easterly side of this strip. (Rec., p. 16) This "thirty-foot strip" as it was termed, was only a small part of the ground actually in conflict between the Nine Hour and the St. Louis, the total area of which was about two acres. The Nine Hour Lode as located stood two-thirds in the name of William Robinson and one-third in the name of James Huggins, and the title of the plaintiff to the property came through mesne conveyance from the original locators, the description in the deed in each case being for the Nine Hour Lode Claim, as recorded in the office of the County Recorder of Lewis and Clarke county, in Book of Lodes, page 457, to which reference was made for a more complete description of the said Lode Mining Claim; or, in some of the later ones, as survey lot No. 63, survey 1705, which survey embraced the Nine Hour Lode as originally located.

NO FEDERAL QUESTION INVOLVED.

The chief contention of the defendants on the trial of this case was that the contract sought to be enforced, Exhibit "A," attached to the complaint, was contrary to public policy and therefore void. It was contended that the allegations of the complaint, and the proof in the case clearly showing that at the date of the execution of the said bond, the strip of land in controversy was a part of the Nine Hour Lode, and was not then, and had never been a part of the St. Louis Lode, any agreement that it should be entered by Mayger, as a part of the St. Louis Claim, was *contra bonos mores*. It was not pretended that there was any provision of the Mineral Lands Act expressly forbidding the alienation of a mining claim, or of any portion of it, or that the entry by one of the parties, of ground in reality belonging to the other, was in any sense a fraud, as against the government, but it was claimed that in contemplation of law, only the actual owner of the claim was entitled to enter it and obtain a patent for it; that where one made application to enter a mining claim and there was embraced therein ground claimed by another, it was the latter's duty to file an adverse claim in the land office, and thereafter bring, in some court of competent jurisdiction, an action to determine the right to the possession of the area in conflict, which action must be prosecuted to a final judgment or dismissed, and that no valid settlement could be made by which the adverse claimant could acquire any interest in the ground patented by the applicant.

The doctrine is monstrous and finds no support in either law or reason. Settlements of this character are of frequent occurrence in actual practice, and we think it may be safely said that as many adverse suits are compromised, as are finally tried and determined by judgment. The area in dispute is either divided between the respective claimants, or, the applicant, as in the case at bar, is allowed to proceed and obtain a patent for the entire ground covered by the adverse claim, upon his executing an agreement to convey the whole of it or some stipulated portion thereof to the adverse claimant. If there was a valid location of the mining claim in the first place, the area thus claimed becomes segregated from the public domain and becomes the property of the locator. There is no inhibition in the Mineral Lands Act against alienation, and he may therefore sell it, mortgage it or give away the whole or any portion of it as he may see fit.

Forbes v. Gracey, 94 U. S. 762-766.
Belk v. Meagher, 104 U. S. 279-283.
Manuel v. Wulff, 152 U. S. 505-510.
Black v. Elkhorn Mining Company, 163 U. S. 445-449.

No question is raised in the record as to the validity of the location of the Nine Hour Lode by Robinson, the original locator of it, and the proof abundantly shows that his location was in all respects sufficient and valid. When the controversy afterwards arose between himself and Mr. Mayger, as to a portion of it, there was nothing compelling him to file an adverse claim. He might have allowed Mayger to have entered the entire area in conflict had he chosen to do so. The settlement made resulted in giving to him an equitable title immediately, and ultimately he was to have the complete legal title of a piece of ground which rightfully belonged to him. The government was not defrauded in any way, nor was there any legal or moral fraud involved in the transaction. The law upholds the adjustment of disputed matters without recourse to litigation, and settlements of matters already in litigation are favored.

Hart v. Gold 28 N. W. 831.
Wills v. Neff, 14 Oregon 66.
Cent. Trust Co. v. Wabash, St. L & P. Ry., 29 Fed. 546.

The one federal question in the case, upon which plaintiffs in error sued out their writ, and upon which they base their claim of jurisdiction in this court, is the one we are here discussing. In their petition for a writ of error (Rec., p. 115) they say:

"That in the above entitled cause there was drawn in question the construction of the statutes of the United States, to-wit: The construction of an act of Congress of the United States Approved May 10th, 1872, and a provision or clause thereof, to-wit:: Section 2325, Chapter VI., Revised Statutes of the United States, and other sections of said chapter bearing upon the construction of said section, touching the validity of a certain agreement upon which the right of action of plaintiffs in error is based, marked Exhibit "A" and made a part of the pleadings in said action, and upon the validity of which the title of the said plaintiffs in error and defendant in error depends, to the real estate in controversy; that said premises were and are claimed by defendant in error in said suit and proceedings, under United States patent therefor, and the construction of said section and other sections of said Chapter bearing thereon; that said question not only involves the validity of said agreement under said United States statutes but the validity thereof under the doctrine of public policy, and that the same was in violation of the policy of the laws of the United States, and was void under a proper construction of said laws and the policy thereof, and that the decision of the said Supreme Court of the State of Montana was against the title and right of the plaintiff in error to said premises."

And every assignment of error, made by the plaintiffs in error to the decision rendered by the Supreme Court of the State of Montana is based upon the same proposition; for example, the first assignment of error (Rec., p. 116) is as follows:

'The Supreme Court of the State of Montana erred in holding that the agreement upon which this action was and is based is not void under section 2325, Chapter VI., of the Revised Statutes of the United States, and other sections of said chapter relating thereto; and that said agreement was and is not void as opposed to the policy of said section and chapter, and that the same was and is not void as against public policy in the administration of the land laws of the United States."

It is needless, perhaps, to say that the section referred to does not in terms, or by implication, forbid making such a contract as was here made, nor is there anything to be found in the statutes of the United States prohibitory thereof. The Supreme Court of Montana in the opinion rendered in this case, (Rec., p. 113) after reciting the facts says:

'Our attention has not been called to any statute of the United States that prohibits such contracts, and, unless there is some statutory prohibition, we can conceive of no reason in law or equity, why the contract in this case should be held to be illegal. *Gaines v. Molen, 30 Fed. 27.*"

Montana Mining Co., v. St. Louis M. & M. Co., 51 Pac. Rep. 826.

The decision of the Supreme Court of the State of Montana, upon this question, is exactly in line with the decisions of this court. There is no common law basis for public policy in the federal courts. That which is not contrary to the Constitution or some Statute of the United States, is not contrary to public policy.

Says Chief Justice Chase, in the *License Tax Cases, 5 Wall 4691:*

"This court can know nothing of public policy, except from the Constitution and the laws and the course of administration and decision. It has no legislative powers; it cannot administer or modify any legislative act; it cannot examine questions as expedient or inexpedient, as politic or impolitic. Considerations of that sort must in general be addressed to the legislature. Questions of policy determined there, are concluded here."

Equally clear and conclusive is the language of Mr. Justice Peckham in *U. S. v. Trans Missouri Freight Association, 166 U.S.* 290-340. He says:

"The public policy of the government is to be found in its statutes and when they have not directly spoken, then in the decisions of the courts and the constant practice of the government officials; but when the law making power speaks upon a particular subject, over which it has constitutional power to legislate, public policy in such a case is what the statute enacts."

But if the Mineral Lands Act, like the Pre-emption Act and other acts relating to the disposition of the public lands, contained a distinct inhibition of alienation prior to obtaining a patent, still

the plaintiffs in error would not be able to make a case within the jurisdiction of this court.

Udell v. Davidson, 7 How. 769.

In this case a pre-emptioner under the act of 1838 agreed to enter land and then convey it in trust to the creditors of one to whom he had sold his inchoate right of pre-emption. Relying upon this agreement the creditors advanced money to enable the pre-emptioner to pay for the land. Title was obtained in accordance with the agreement and conveyed to the trustee by a deed absolute on its face. Upon the refusal of the trustee to carry out the agreement, an action was brought by the creditors to enforce the trust, and to this bill the trustee demurred on the ground that the agreement, in pursuance of which the title was conveyed to him was in violation of the Act of 1838. The demurrer was overruled and the trust declared, and on appeal to the Supreme Court of the State the decision was affirmed. To this decision a writ of error was sued out and the case taken to the Supreme Court of the United States, on the ground that a title, right or privilege or immunity, claimed by the plaintiff in error under the laws of the United States, was called in question and decided against them, which is precisely the contention in the case at bar. Mr. Chief Justice Taney in granting the motion to dismiss the writ of error says:

"They do not claim that Udell obtained a valid title by the entry made by Gregory, and his subsequent conveyance to Udell. And if their defense had been placed on that ground it would not have given jurisdiction to this court, because the proceeding to charge it with a trust created by contract would have been no impeachment of the grant made by the United States. They defend themselves upon the ground that the transaction between them and Gregory, by which the entry was made under a previous contract to convey, was a violation of the Act of 1838. This is undoubtedly true, for the act required the party who claimed the right of pre-emption by residence, to make oath that he has not contracted to sell or transfer the land to any other person. And he is not permitted to purchase at the low price at which a person entitled to pre-emption is allowed to buy, until his oath is taken and filed with the Register of the Land Office. And if he swears falsely he is liable to an indictment for perjury, and forfeits all title to the land, and deeds made by him convey no title, unless they are made to a *bona fide* purchaser without notice.

"The plaintiffs in error admit that they participated in the fraud, and consequently Udell, upon their own showing, has acquired no right to the land under the act of congress on which he relies. They do not claim that he obtained a valid title under the law, but insist that the transaction was against its policy and in

violation of its principles. What right or privilege does he then claim under this act of Congress? It is this: He not only admits, but insists, that by a fraud upon the government he has obtained a deed for himself for this land, and that he being trustee for the creditors of Miller, used the money which belonged to his *cestuis que trust* to accomplish his purposes; and now contends that by means of this fraud upon the government, he has acquired under this act of Congress a right to perpetrate a fraud also upon his *cestuis que trust*. This in plain words is the amount of his defense; and this is the right or privilege which he claims under the provisions of the act of 1838, and calls upon this court to recognize and maintain. We shall not comment upon such a claim."

Udell v. Davidson was affirmed in Walworth v. Kneeland, 15 How., 348.

This was an action to obtain the specific performance of a contract for the conveyance of a certain quarter section of land described in the bill. The contract under which the complainant claimed was alleged to have been made by one Walworth, with a certain Jonathan E. Arnold; that Arnold in pursuance of, and in execution of the agreement with Walworth, entered upon and took possession of the land and afterward assigned his interest to the complainant, who took possession and still held it when his bill was filed; that Walworth had become the purchaser pursuant to his agreement with Arnold, and obtained a legal title from the United States, and was bound under that agreement, and the assignment of Arnold above mentioned, to convey the land to the complainant. Upon the final hearing in the State court, Walworth was directed to convey to the defendants in error one-half of the quarter section in controversy. The case was appealed to the Supreme Court of the State, where the decree was affirmed and a writ of error was sued out to reverse the decree. The facts upon which he based his rights to sue out a writ of error in the case, to this court, were stated in the answer, and seemed to be that at the time the contract was made there was no act of Congress which authorized settlement on the land, or gave any right of pre-emption to those who had settled on it; that they were trespassers, and had illegally combined with a large body of men of like character, who had settled upon the public lands in that district, which were in the same situation, to secure to each other the lands settled upon by them respectively, and to that end, they were to prevent the lands from being sold for more than one dollar and twenty-five cents per acre; and to secure to each other the said lands at that price; that they had adopted rules and regulations and established a land office in which their respective claims were to be entered, and had agreed that if the government refused to grant the right of pre-emption at the

price above named, and directed them to be sold at public auction, the settlers would by force and terror, or as said in the answer, "by club or lynch law" prevent any one from bidding against the settler for the land he had entered at their land office, and would by such means enable the settler to get the land at the minimum price of $1.25 per acre; that under an agreement of this character Frisbee was to hold possession, have the claim entered at the settlers' land office, and if they ultimately succeeded in pre-empting the land, he and Frisbee or Arnold were to share in the profits; that is, each to have an equal interest in the tract of land, he, Walworth, to furnish the money to pay for the land.

In dismissing the bill Mr. Chief Justice Taney refers to the fact that the State Supreme Court had declared in its decree that such a contract as was alleged in the answer would be void, and that it held in favor of the defendant in error, on the ground that it was not proved by legal testimony that either Frisbee, or Arnold, had undertaken to associate themselves with the illegal combination of settlers, "But if it had been otherwise," said Chief Justice Taney, "and the State court had committed so gross an error as to say that a contract forbidden by an act of Congress or against its policy, was not fraudulent and void; and that it might be enforced in a court of justice, *it would not follow that this writ of error could be maintained.* In order to bring himself within the twenty-fifth section of the Act of 1789, he must show that he claimed some right, some interest, which the law recognizes and protects and which was denied to him in the State court. But this Act of Congress certainly gives him no right to protection from the consequences of a contract made in violation of law. Such a contract, it is true, would not be enforced against him in a court of justice; not on account of his own rights or merits, but from the want of merits and good conscience in the party asking the aid of the court. But to support of this writ of error he must claim a right which, if well founded, he would be able to assert in a court of justice upon its own merits, and by its own strength. No such right is claimed in the answer of the plaintiff in error. And indeed it would be a novelty in legislation and in public policy if Congress had taken so much pains to provide for the protection of persons who had combined with others to perpetrate a fraud on the United States and found themselves in the end the sufferers by the speculation; or who, by the error of a State court, had been compelled to share its gains with their associates in the fraud. The right or interest claimed in the State court must be of a very different character to entitle him to the protection of the Act of 1789. It has already been so decided in the case of *Udell v. Davidson, 7 How. 769.*"

These cases have never been overruled, or the doctrine therein laid down doubted, and they seem to us to be absolutely conclusive upon the proposition that even if the settlement made was, as contended by plaintiffs in error, contrary to public policy, and the bond for a deed, Exhibit "A," absolutely void for that reason, this court would not have jurisdiction of the case. The doctrine established by them is clear. No federal question is raised because the plaintiffs in error do not by their answer or otherwise, set up any right, title, privilege or immunity arising under the law or Constitution of the United States, within the meaning of Section 709 U. S. Revised Statutes. As is said in *Udell v. Davidson*, the plaintiffs insist that because by reason of a fraud upon the government they obtained title to the ground in controversy, they have acquired a right to perpetrate another fraud upon the defendant in error. Such a contention ought not to find favor in any court.

THE WRIT SUED OUT FOR DELAY ONLY.

It is manifest from the most casual examination of the record that this writ of error was sued out for delay only. After a careful trial of the case, a full and careful argument in the State Supreme Court, and the well considered opinion rendered by that tribunal, they cannot seriously think that there is anything in their contention. It is like all of the other proceedings taken by them since the rendition of the original decree in the case. Take, for example, their motion for a new trial. The decree was entered in the State Dist. Court on June 1st, 1895. (Rec., p 96) On June 10th, the last day allowed them by statute for that purpose, they served their notice of intention to appeal from the judgment, which appeal was perfected by filing the requisite undertaking. On the 13th of the same month they served their statement on motion for a new trial, to which certain amendments were suggested promptly, and within the time allowed by the statute therefor, but it was not until the 13th day of July, 1896, one whole year after the filing of their statement, that they presented their statement to the court for settlement. (Rec., p. 106.) This is not the only inexcusable delay on the part of the plaintiffs in error, shown by the record, and we think the court is fully justified in finding that this writ was sued out for delay only.

THE QUESTION UPON WHICH JURISDICTION DEPENDS IS SO FRIVOLOUS AS NOT TO NEED FURTHER ARGUMENT.

But if it shall appear that this court has jurisdiction, then we say that the question is so frivolous as not to need further argument. As already remarked, just such settlements of controversies and disputes over the right of possesion of mineral land, as the one

shown in the case at bar, are of almost daily occurrence, in applications to enter and obtain patents to mineral lands, and yet, until this case, it does not seem to have occurred to any one that such settlements were contrary to public policy, or to any statute of the United States. The learned counsel for plaintiffs in error have the honor of raising this question for the first time in any court of last resort.

We have already seen that when a valid location of a mining claim is made, the area thereof becomes segregated from the public domain and the claimant is the owner thereof, so long as he performs the annual labor requisite to maintain his title, as fully to all intents and purposes as if he had a patent for it. There are no conditions attached to his grant, and no restrictions upon his enjoyment of his property as he may desire. Under these circumstances, certainly a settlement and arrangement of a dispute with reference to the right of possession of a portion of the surface of a mining claim, fair upon its face and satisfactory to the parties at the time it was made, such as shown by the record in this case, must be upheld, unless it be found to contravene some express Act of Congress or some fundamental principle of law, which has been declared by this court to be the basis of a public policy. This court has frequently refused to extend the inhibition against alienation found in the pre-emption law, beyond the letter of the statute, and has therefore, declared that there is no public policy restraining the alienation of rights in lands acquired under the United States, unless it is expressly forbidden by statute.

In *Meyers v. Croft*, *13 Wall*, *291*, this court was asked to hold that the prohibition against alienation found in the last clause of the 12th section of the Pre-emption Act of 1841, extended from the date of entry until the actual issue of patent. This the court declined to do, and held that the object of the act was attained when the pre-emptor went with clean hands to the Land Office and proved up and paid for his land. The court says:

"Restrictions under the power of alienation after this would injure the pre-emptor and would serve no important purpose of public policy. It is well known that patents do not issue in the usual course of business in the General Land Office until several years after the certificate of entry is given; and equally well known that nearly all the valuable lands in the new states admitted since 1841 have been taken up under the pre-emption laws, and the right to sell them freely exercised after the claim was proved up, the land paid for and the certificate of entry received. In view of these facts, we cannot suppose, in the absence of an *express declaration to that effect*, that Congress intended to tie up these lands of the original owners, until the government should choose to issue the patent."

In *Davenport v. Lamb, ibid, 418*, the court upholds a covenant made by certain grantors "that if they obtain the fee simple to said property, from the government of the United States, they will convey the same to the grantee, his heirs or assigns, by deed of general warranty." This was with reference to a tract of land taken up under what is known as the Oregon Donation Act, which contained a provision against alienation in all respects similar to that found in the pre-emption act, but the deed containing this covenant was made prior to the passage of the act, as appears by the case of *Lamb v. Davenport, 18 Wall, 307*. In this case the point that this covenant was against public policy, was distinctly made, but this court refused to sustain it, holding that the Donation Act not having been passed at the date when the contract was made, there was no inhibition against the making of such contracts, and this court declined to give the statute a retrospective operation.

In *Lamb v. Davenport* one might well suppose that this court was discussing the right of a miner to his mining claim. Speaking of claims under the Oregon Donation Act, Mr. Justice Miller says:

"They were the subject of bargain and sale and as among the parties to such contracts they were valid. The right of the United States to dispose of her own property is indisputed, and to make rules by which the lands of the government may be sold or given away is acknowledged, but subject to these well known principles, parties in possession of the soil might make valid contracts even concerning title predicated on the hypothesis that they might thereafter lawfully acquire the title, except in cases where Congress has imposed restrictions on such contracts."

The same principle was determined in *Thredjill v. Pintard, 12 How., 24*, as applicable to the pre-emption law. A settler on the public lands having a pre-emption right sold his land to a person who again sold to a third party. The original vendor was decreed a lien upon the land for a balance of the purchase money still due him, notwithstanding the vendee had taken out a patent in his own name, under a subsequent pre-emption law.

One of the clearest and strongest cases which we have been able to find is that of *Gaines v. Molen, 30 Fed. 27*. The plaintiff in that case had purchased, enclosed and cultivated a portion of the Hot Springs reservation in the State of Arkansas, and had sold a part of the tract to defendant, who went into possession of it and built a house on it. The defendant at the time of his purchase entered into an agreement in writing to reconvey to the plaintiff an undivided half interest in the tract within thirty days after he acquired title to it from the government. In this contract it was agreed, among other things, that the plaintiff should furnish the evidence necessary to enable the defendant to make entry of the

tract under the provisions of an act for the relief of settlers upon the Hot Springs reservation then pending, but which had not then passed Congress. This contract was agreed to be, and was kept secret. After the passage of the Act, the entry was made, the plaintiff furnished the necessary evidence, but the defendant refused to make the conveyance, and suit was brought to enforce the specific performance of the contract. The defendant pleaded want of consideration and illegality of the contract. Mr. Justice Brewer, then upon the bench of the Circuit Court for the Eastern District of Arkansas, says:

"The contract which was made was in no manner a violation of any act of Congress, nor did it contravene any public policy. It was a contract between two parties who might possibly be contesting claimants under some future act of Congress, for a settlement of their respective claims. The case of *Sutherland v. Whittington, 46 Ark. 285*, is very much in point, and the decision of that learned court is in accord with the views I have expressed. See also *Lamb v. Davenport, 18 Wall. 314*."

As before remarked, contracts of this character are of frequent occurrence in the entry of mineral lands, and in *Ducie u. Ford, 8 Mont. 233*, suit was brought to enforce the specific performance of a verbal contract of this character. The plaintiffs claimed that the defendant had agreed to deed them the undivided one-half of a certain mining claim, after patent had been obtained, in consequence of plaintiffs abstaining from filing adverse proceedings and paying one-half of the expenses of obtaining a patent. The plaintiffs had located the ground as the "Figi Lode" and the defendants claimed the same ground as the "Odin Lode." As is argued in the case at bar, one or the other of these parties was entitled to enter the ground, and collusive entry by the wrong party would have been against the policy of the law, if the doctrine contended for by the plaintiffs in error is to obtain. Nevertheless, the case was decided upon the proposition that the contract was within the statute of frauds, and was void for want of a writing. The proposition that there was anything so radically wrong about such a contract as rendered it *contra bonos mores*, does not seem to have occurred to the Honorable Supreme Court of the State of Montana.

This case was appealed to the Supreme Court of the United States and this learned tribunal decided it upon the question of the statute of frauds, and seemingly without any suspicion that such a contract, whether oral or in writing, would be void as contravening some statute of the United States, or as being contrary to public policy.

Ducie v. Ford, 138 U. S., 587.

Such bonds as the one here in suit, are enforced without question by the courts, and in no case that we have been able to find has even a doubt been suggested as to their validity.

Turck v. Mining Co., 5 Pac. 838.

O'Keefe v. Dyer, 52 Pac. 197.

The case of *Mitchell v. Cline, 84 Cal. 409*, cited and relied upon by counsel for plaintiffs in error in their brief in the court below, is not at all in point. In that case there had been a fraudulent location of placer mining ground by which three persons in one case, had located one hundred and fifty acres, the law limiting the amount of ground to be located by one person to twenty acres. This was done by means of dummy locators; that is to say, the ground was located in the names of friends of the parties, who afterwards and without consideration conveyed to the persons who were the actual claimants. The court very properly refused to look into, or consider the agreement under which the title to the ground was thus obtained, but granted partition of the claims according to the title of the parties respectively as the same appeared of record.

In *Miller v. Ammon, 145 U. S. 421* the action was to recover for liquor sold in violation of a statute, requiring persons dealing in spirituous liquors to obtain a license and making it a penal offense to sell liquors without obtaining a license.

In *Swanger v. Mayberry, 59 Cal. 91*, a recovery was sought for timber cut on the public lands of the United States, the statutes forbidding such cutting, and substantially the same state of facts existed in *Ladda v. Hawley, 59 Cal. 51*.

Without reviewing the authorities found cited in their brief we deem it safe to say that in each case the matter constituting the cause of action was found to contravene the provisions of some express statute, and only serves to accentuate and emphasize the rule laid down in *Myers v. Croft* and other cases cited *supra*. It is a sufficient answer to this line of authorities to say that in the case at bar there was no statute which, in express terms, or by any fair implication, forbids the making of such a contract as is here in controversy. Nor is there anything in the Mineral Lands Act from which it can be contended with any show of reason that Congress intended in cases arising under it, to abrogate or annul the old legal maxim *republicae ut sit finis litium*.

Respectfully submitted,

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